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State of Utah, in the Interset of w.e.m. A Person Under 18 Years of Age.

Utah Court of Appeals

Case No. 20150681-CA

THE UTAH COURT OF APPEALS

STATE OF UTAH, in the interest of W.E.M.
A person under 18 years of age.

W.E.M.,
Appellant,

v.

STATE OF UTAH,
Appellee.

REPLY BRIEF OF APPELLANT W.E.M.

On appeal from the Third District Juvenile Court, Salt Lake County, Salt Lake
Honorable Mark May, Juvenile District Court No. 1108641

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ARGUMENT

I. The Facts Do Not Support the Juvenile Court's Ruling

a. The State Improperly Attributed Findings of Fact to the Juvenile Court Which the Court Never Found and Which Are Not Supported by Evidence.

There are no facts supporting a claim WEM intentionally hit Ms. Zimmerman, a school employee, or that, until after the fact, he even knew the person into whom he was shoved by KJJ, much less that the person was Ms. Zimmerman and/or a school employee. In its Appellee Brief, the State acknowledges that unless at the time of the incident WEM had both the intent of hitting a school employee and knew that the person being hit was a school employee, no assault can be found. See Appellee Brief at 8-9, in which the State argues that intent and knowledge at the time of the incident were proven. However in their closing argument at trial the State argued differently, claiming it was sufficient that prior to that day WEM had participated in the "bumping game" and that, even though KJJ was not targeting a school employee and in fact did not even see the school employee until after the shove of WEM took place, because both KJJ and WEM knew from before that day that Ms. Zimmerman was an employee, that prior knowledge was sufficient to find guilt under the statute. The State's specific argument was as follows:

> MS. DAUGHERTY: Your Honor, the victim was a school employee. I don't think that there's anything in the statute that says they need to specifically target a school employee, it's just that it's an assault of a school employee. The State has certainly met that burden.
> (R. 24 [Transcript] at 62.)

The judge in his short narrative ruling clearly adopted the State's closing argument on that point. So that there is no question, here is the totality of the court's ruling:

> I find the following has been proved beyond a reasonable doubt. Ms. Zimmerman was an assistant principal at Eisenhower Junior High. W knew Ms. Zimmerman was a school employee and had had dealings with her in the past in that capacity. W engaged in what I will call the bumping game with his friends on more than one occasion. W knew that the bumping game could result in someone getting hurt. On December 9th, W and his friends were - maybe not friends at this point - K were playing the bumping game at the Eisenhower Junior High. At least three incidents of the bumping game occurred that morning, one before the incident involving Ms. Zimmerman, the incident involving Ms. Zimmerman and the one after that incident with Ms. Zimmerman. And while playing the bumping game W dipped his shoulder and struck Ms. Zimmerman. The force of the impact knocked her off balance. She felt as if she had been hit hard and caused her bodily pain. The requirements for assault against a school employee is that any person who assaults a public employee. So we have to look at what assault is. The definition of assault is an act committed - one of the definitions - an act committed with unlawful force or violence that causes bodily injury to another or creates a substantial risk of bodily injury and bodily injury is defined as pain. So there was an assault an employee. W again had knowledge that the individual was an employee. The employee was acting in the scope of her authority as she's testified and I'll find also that she was walking up and down the halls as was one of her normal obligations as an assistant principal. So I'll find that W, that you are guilty of assault against a school employee.
> (R. 24 [Transcript] at 116-117.)

The State can look in vain in the record for any clear finding by the court that at the moment of the incident, WEM formed an intent to assault a school employee and carried out that intent by intentionally lowering his shoulder with the purpose of striking that employee. The court's finding that WEM had participated on previous days in the bumping game with his friends should not and does not equate to a finding that WEM formed any intent to commit an assault on the day in question, much less an assault

against a school employee. Evidence of friendly pushing among classmates on previous days could possibly support an involvement in rowdy behavior among students on the day in question. But it does not equate to targeting a school employee, particularly when there is no question in the record that it was only KJJ who was doing all the pushing on the day in question and that at no time on that day or any day before had KJJ targeted any school employee.

As to the claim by the State on appeal that W lowered his shoulder with the intent of striking someone (a claim not argued at trial[1]), the State's own testimony on that subject,

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[1] The full text of the State's closing argument is as follows:

> MS. DAUGHERTY: Your Honor, in order for the State to prove this allegation against W, the 1 State just needs to meet each element of the offense, beyond a reasonable doubt. So if we turn to the offense of assault on a school employee which is in the petition. There are four elements and one that W did assault Brenda Zimmerman, that Ms. Zimmerman was an employee of a public or a private school, that the assault was with knowledge that she was an employee and that she was acting within the scope of her employment when the assault occurred. Elements two through four were met through Ms. Zimmerman's testimony. She testified that she was the Intern Assistant Principal, that she was part of administration at Eisenhower Junior High. She testified that W knew of her position, knew that she was an employee of the school because she had several interactions with him in her role as the Intern Assistant Principal and his role as a student and then that she was acting within her scope of employment that morning. She testified that she was walking the halls, supervising students before school that morning. So in order to meet the element of No. 1, that an assault occurred on Brenda Zimmerman, we look to the statute for assault which is 76-5-102 and under subsection C, assault is defined as an act that causes bodily injury to another or creates a substantial risk of bodily injury to another. If I may approach the Court with the definition of bodily injury in 76-1-601, Subsection 3, 1 bodily injury means pain and Ms. Zimmerman testified that when W bumped her shoulder, when W shoulder checked her, she was knocked off her balance and then her shoulder hurt, she experienced physical pain for several minutes in her shoulder after this happened. So, Your Honor, certainly an assault occurred on Brenda Zimmerman. So is W responsible for that? And yes, W's conduct with K pushing him in the hall into other students would satisfy causing the bodily injury. But it also would satisfy the second prong of assault, of creating a substantial risk of bodily injury by its own admission when he was pushing, when they were engaging in this game of pushing

as elicited from Officer Dial, was that WEM was pushed off balance. The act of lowering one's shoulder upon being pushed is a natural result of being pushed. Simply put, WEM was caught by surprise each time he was bumped, and was thrown off balance each time. (R. 24 [Transcript] at 50, 65.) This reaction was made clear not only by the testimony of Officer Dial and WEM, but the video itself, showing that as WEM was pushed, each time he stumbled and bent over. That is a physical reaction, not an act of intent.

b. The critical facts were not found beyond a reasonable doubt.

In order for the court to determine that the case of assault was proven beyond a reasonable doubt, the court had to reject the unrebutted testimony of WEM in a number of key particulars:

1. That he did not anticipate being pushed.
2. That he did not see Ms. Zimmerman until he was hit into her.

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one another into people, that created a substantial risk of bodily injury. W is criminally responsible for K's conduct as a party to the offense. There is party liability. K testified, we both did something wrong. Even by W's own statement he acknowledged that he should have apologized to Ms. Zimmerman. So he is again acknowledging his own criminal responsibility there. Further, they have admitted that they have done things like this in the past. That testimony came from both K and from Ms. Branch. The only person who says anything different is W. And I think if you look at the credibility of the witnesses on who has something to lose and whether or not this shoulder checking had happened to random people, certainly K who has already taken responsibility for this matter, but also stood up and said that yes, we had done this to other people. He walked you through the video. There was an incident that occurred before the shoulder checking of Ms. Zimmerman and there were incidents that occurred after the shoulder checking of Ms. Zimmerman as well. So W was fully aware of what was going on and fully involved in the assault on Ms. Zimmerman.
(R. 24 [Transcript] at 103-106.)

3. That on the day in question he pushed no one.

4. That on previous days he never pushed anyone other than his friends

5. That he did not bump into Ms. Zimmerman purposefully.

The court also had to reject the unrebutted testimony of KJJ:

1. That he was the one who did the pushing in question, and indeed all the pushing that took place that morning.

2. That KJJ did not intend to push WEM into any school employee

3. That KJJ did not see Ms. Zimmerman until after the incident had occurred. [2]

The State in its Appellee Brief now admits that under the law, any one of those facts would exonerate WEM. As a result, the State now appears to rely on the slender reed that court in its ruling said WEM "dipped his shoulder" as he was falling into Ms.

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[2] The following testimony reaffirms KJJ's position on the subject:

> Q That's the question, did you target Ms. Zimmerman?
> A No.
> (R. 24 [Transcript] at 34.)
> * * *
>
> Q Okay. And did you see her before you pushed or bumped W?
> A Ummm, obviously not because I wouldn't have bumped him if I would have seen her.
> Q Would you ever intentionally yourself bump into a school employee?
> A Like what do you mean?
> Q Would you purposely shoulder check a school employee?
> A No.
> Q Why not?
> A 'Cause of trouble.
> Q All right. And at any time did you target Ms. Zimmerman?
> A Nope.
> (R. 24 [Transcript] at 40.)

Zimmerman after being pushed by KJJ. The State now argues that the dipping of the shoulder constituted a knowing and intentional act of assault of a school employee. However, the court never found WEM's intention as of the time of the incident, relying instead on his conduct with his friends from earlier days. Likewise, nowhere in that ruling does the judge say the dipping of the shoulder was a willful and contemplated act of WEM. At most the judge made an observation of what happened to WEM after he was pushed. Second, at no time does the court say WEM recognized Ms. Zimmerman prior to dipping his shoulder. Finally, the court specifically found that WEM was pushed by KJJ, not once but three times in the space of just a few minutes.

The State called Officer Dial as one of its three witnesses in its case in chief. Officer Dial works for the junior high school as a resource officer and is considered part of the school administration. Thus if there is a bias on his part, it would be in favor of the school's action and the State's argument. It is also important to note that of all the witnesses in the case, Officer Dial alone had access to the original surveillance tape. According to Officer Dial's testimony, the copy of the surveillance tape presented at court was not as clear as the original tape. (R. 24 [Transcript] at 56-57.) Officer Dial gave it as his opinion that KJJ pushed WEM. He came to no other conclusion. It was also his opinion, which he put in writing at the time as well as confirming it at trial, that

the conduct in question amounted to reckless conduct.[3] In other words, Officer Dial, as the best witness as to what the surveillance tape showed, did not find any pushing by WEM and classified the whole matter as reckless conduct, rather than assault.[4] Officer Dial unequivocally called what happened a pushing by KJJ of WEM. He confirmed that in his conversation with WEM the day of the incident.[5] In court he also described the reaction of WEM to the pushing as stumbling.[6] Because Officer Dial is a police officer, he is familiar with the crime of assault. This is clearly a case of KJJ shoving WEM with no suggestion of assault or any intentional conduct by WEM.

If for any reason the findings of the juvenile court could be construed to reach the conclusions now being advocated by the State, then it is clear that the juvenile court

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[3] Q After you reviewed all of this you recommended a charge of reckless conduct, correct?
A I did.
(R. 24 [Transcript] at 58.

[4] Q All right. You heard W say that he was bumped by K, correct?
A Correct.
Q Okay. All right. Do you have any reason not to believe that?
A No.
(R. 24 [Transcript] at 59.

[5] Q (BY MS. DAUGHERTY) What, if anything, did W say about his conduct?
A He basically said that he was pushed into it, that he didn't do it intentionally.
(R. 24 [Transcript] at 54.

[6] Q Okay, thank you. And then what was W's response?
A To me it looked - I mean, he took a stumble like he tripped over his foot and went right into this kid and this kid, looked like he kind of knocked this kid back.
(R. 24 [Transcript] at 50.)

found those facts against the clear weight of the evidence and certainly not beyond a reasonable doubt. There was no enumeration by the juvenile court of the facts on which the State is now relying. Rather, the State is now trying to reconstruct facts out of the record in an effort to bolster the juvenile court's ultimate decision, without any of those facts having been found by the juvenile court. Thus either the juvenile court did not find the facts now being argued by the State or, if it did, there was insufficient evidence to support such facts, particularly beyond a reasonable doubt.

The State argues that because the judge used the words "beyond a reasonable doubt" to introduce his ruling, somehow that translates the ruling into actual findings supported by evidence beyond a reasonable doubt as to every point the State is now arguing. That is not the case. The ruling of the court was that WEM knew who Ms. Zimmerman was, but not necessarily at the moment he was shoved into her. Rather he knew her from earlier dealings and from then seeing her after the incident had already taken place. That is a far different finding than a finding that at the precise moment of the incident, WEM saw Ms. Zimmerman, cognitively knew who she was, made a decision to bump into her and somehow got KJJ to shove him into her. There are no findings of fact anywhere in the record supporting that claim, much less beyond a reasonable doubt.

To accomplish what the State claims happened, there had to be some kind of arrangement between KJJ and WEM that KJJ would push WEM into a school employee

and that WEM would actively participate in that activity. That is not only totally unsupported in the record and in the facts, but also makes no sense. It is part of the undisputed facts that Ms. Zimmerman did not know who bumped into her until she turned around, after the incident. Likewise, WEM did not know he was pushed into until he turned around. Finally KJJ did not know who he pushed WEM into until after the incident. Thus to reach the facts that the State is arguing, the juvenile court would had had to find, beyond a reasonable doubt, that WEM knew he was going to be pushed the moment he was pushed, even though KJJ said everything he did in that regard was random. Furthermore, both boys would have had to have known that Ms. Zimmerman was coming around the corner, a fact they could not possibly have known. In short, the critical facts are totally missing, particularly beyond a reasonable doubt.

c. WEM Did Not and Was Not in a Position to Participate in the "Bumping Game" On the Day in Question.

It is important to remember that the judge did not find that WEM had participated in the "bumping game" on the morning in question. He cited the bumping among students from earlier days to make the case that WEM was a willing participant on the day in question, but otherwise as to the morning in question attributed all the bumping to KJJ.

Despite the finding of the juvenile court and despite WEM's unequivocal statement that he did not push anyone on the day in question, the State argues that on the day in question WEM was a willing and indeed active participant in the pushing. Their evidence rests solely on the testimony of Ms. Zimmerman as to what happened as she

came around a corner in the hall and a vague statement by KJJ that both he and WEM were involved in the pushing. The true facts, fully supported by all the unequivocal and undisputed testimony in the record, are that WEM did no pushing at all that day, nor was he in a position to push KJJ into random people in the hall.

As made clear by the video and from KJJ's own testimony, reiterated several times during the course of the trial, KJJ, WEM and KJJ's girlfriend T were walking side by side the whole time that morning.[7] WEM was walking to the left of KJJ and T was walking to the right of KJJ. If there had been any shoving by WEM that morning, he would only have been able to shove KJJ into his girlfriend T. The idea of "messing around," as made clear by KJJ in his testimony, was to bump into random people as they are coming in the opposite direction. There is no way while they were walking side by side that WEM could have pushed KJJ into anyone other than his girlfriend. In other words, he could not have pushed KJJ into oncoming traffic. Therefore the only one initiating the bumping game that day was KJJ. He was the only one doing the random pushing into oncoming traffic. He said also said so plainly in his testimony. WEM said so. The video verifies this. There is absolutely no testimony to the contrary.

The following is the testimony the State initially elicited from KJJ on the subject of the bumping on the day in question:

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[7] This was about the only activity available to the students that morning because the classrooms were locked until school started. (R. 24 [Transcript] at 24, 63-64.)

> Q Okay, you described a lot about **what you were intending to do**. But why don't you **just tell the Judge what happened**, what you did do? A **I was bumping into W** and he'd bump into somebody else and that's the case of this right now.
> Q Okay. Was one of the people that W bumped into after you bumped into him an employee of the school?
> A Yeah.
> Q Who was that?
> A Ms. Zimmerman.

(R. 24 [Transcript] at 28.) Nowhere in the testimony from KJJ does he ever identify a single incident of WEM bumping anyone on that day. As to that morning, it was all about KJJ doing the bumping. Although KJJ testified about WEM bumping others on days before the incident, KJJ's specific testimony as to bumping on the day of the incident is that it was he who was doing the bumping. Nor does the evidence support such any other conclusion.

The suggestion that on the day in question WEM may have bumped KJJ is rooted in the following exchange between the prosecutor and KJJ:

> A Yeah, we were walking around the school kind of doing it to everybody.
> Q Okay, and when you're talking about doing it to other people you're talking about other persons, right?
> A Yeah, other school people.
> Q You weren't bumping W into lockers?
> A I might have.

(R. 24 [Transcript] at 29.) The court will note that not once does KJJ say that WEM bumped him into anyone or bumped anyone. Nor does the prosecutor ever ask that question. Rather the collective "we" has reference to KJJ bumping WEM into others. KJJ further clarifies his testimony in the following responses:

Q All right. But on this particular - as you're going in this particular place, if W had bumped you who would you have bumped into?
A T.
(R. 24 [Transcript] at 32.)

* * *

Okay, stop now. Do you see yourself in the film?
A Yeah.
Q Where are you? If you'd come and point (inaudible).
A There.
Q And whose on your left?
A W.
Q And whose on your right?
A T.
(R. 24 [Transcript] at 35.)

* * *

Q Same incident of bumping?
A Yeah.
Q And what was incident?
A We were **bumping W**.
Q In any of that film did you see W bumping into you?
A No.
(R. 24 [Transcript] at 36.)

* * *

Okay. And you've been asked that **you had shoved** W, correct?
A Yeah.
Q And that was true, correct?
A Yeah.
(R. 24 [Transcript] at 39.)

* * *

A "Me, W, and T were walking in the halls and **I was** talking to T, and **bumping into W.**" I can't read my own handwriting.
Q Does it say at the same time?
A Oh yeah, "at the same time. So I'm not sure if when **I bumped into W,** that Ms. Zimmerman was there because we were doing it to a bunch of random kids whenever. **I was** not targeting" I think that says targeting certain people, "we were just doing it randomly."

Q And going back to this film, at least in the film that we have seen, **W, was always on** your left and T, was always on your right, correct?
A Yeah.
(R. 24 [Transcript] at 43.)

* * *

Q And so if W ever bumped you, who would you have ended up bumping?
A Into T.

(R. 24 [Transcript] at 44.)

It must be noted that in connection with his use of "we," KJJ always ends up clarifying that it was he who was doing the bumping of WEM.

d. The Incident was All One Action and Did Not Extend Over Any Measurable Time

The State in its Appellee Brief has gone to the extent of making up evidence by suggesting at page 20 of its brief that there were possibly as much as twelve seconds in which WEM was facing Ms. Zimmerman and plotting to make his assault. To reach this unsubstantiated conclusion, the State totally ignores what all the witnesses said, including their chief witness and accuser, Ms. Zimmerman. She said it was all one continuous motion as she was coming around a corner.[8] She also said it was after she was hit and had continued walking that she turned around to see who hit her. The contact all happened before she turned around. The State also ignores the testimony of Officer

[8] Q Was it instantaneous?
A It was all one act.
(R. 24 [Transcript] at 15.)

Dial, who said that there was nothing in the surveillance tape which showed the actually bumping incident at issue in this case.[9] So the State can point to nothing in the surveillance video which shows the actual incident. The State's argument also ignores the plain physical evidence that Ms. Zimmerman never stopped walking, even as she turned around. Thus, in the space of the twelve seconds which the State now claims for the assault activity, Ms. Zimmerman walked down the hall, passing as many as 15 to 20 students in the very crowded hallway. There would have been no opportunity beyond the first encounter when Ms. Zimmerman came around a corner for there to have been any further contact between the two. Ms. Zimmerman had simply moved on.

The State did not come up with its unsupported theory by citing any evidence. Rather it reaches that strange conclusion by reference to the video tape itself which was introduced into evidence. In this respect the State ignores the fact that no witness at trial could see the actual contact between WEM and Ms. Zimmerman. The one person testifying at trial who had seen the original surveillance tape was Officer Dial, who made clear at trial that he had reviewed the original surveillance tape very closely but did not see the actual contact at issue in this case. (R. 24 [Transcript] at 57.)

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[9] Q Did you view surveillance footage of W's conduct that morning?
A Of that particular incident or of the whole – there was a couple of -
Q Of the incident that you were, I guess called out to of the incident -
A Yes, I did pull up the cameras.
Q And what if anything were you able to see?
A With that particular incident I couldn't see anything other than them walking down the hall.
(R. 24 [Transcript] at 48-49.)

e. The State Does Not Now and Could Not at Trial Rely on Transferred Intent.

The State admits it cannot rely on a claim of transferred intent, which is apparently the basis for the ruling from the juvenile court. It certainly was the argument made by the State at trial. The law in Utah and elsewhere says that an actor will be responsible only for what he intended to do or where his actions were focused.

> [O]ne should be responsible to ascertain and understand the criminal law and should be held accountable only for those acts of criminal conduct for which he or she is mentally culpable in the criminal sense. It is not consonant with our principles of criminal liability when dealing with *malum in se* crimes to hold a person responsible for a crime he did not intend to commit and indeed may even have taken every precaution to avoid committing, even though he intended to commit a lesser crime.

State v. Elton, 680 P.2d 727, 731 (Utah 1984). In other words, if a person intends to hit one person but misses and hits an unintended victim, the actor is not released from the responsibility of being charged with a crime against the person he intended to hit but cannot be charged for the crime he did not intend. This principle has been codified in Utah Code Ann. §76-2-105.

At trial the State ignored the rule on transferred intent by claiming that because WEM had dealt with Ms. Zimmerman before the incident and then because he recognized her after the incident, and even though no intent to assault a school employee was ever intended by either KJJ or WEM, the fact that there was contact meets the requirements of Utah Code Ann §76-5-102.3. However those dots do not connect. The actor had to not

only have an intent as against a known victim, but he also had know at the time of his action that the person about to be assaulted is a school employee.

Ms. Zimmerman was coming around the corner. The one whose intention is most important in this regard, namely KJJ, made it clear that he never saw Ms. Zimmerman at all before the incident and never intended to push WEM in any school employee. WEM was the one being pushed so he could not have formed an intent to assaults a school employee because he did not know he was going to be pushed until it occurred. It was all one motion. Even then, he did not even see, much less recognize Ms. Zimmerman until after the incident.

The State cannot claim transferred intent and therefore cannot claim that if KJJ was focused on and intended to bump WEM into a student but ended up bumping him into a school employee that the elements of the charge have been met. That is clearly what Justice Stewart said in his opinion in *State v. Elton*. However, and contrary to the argument in the Appellee Brief, that is exactly what the judge said in making his ruling.

The State's claim that WEM intentionally bumped Ms. Zimmerman, knowing at the time who she was, is simply made up out of whole cloth and has no support whatsoever in the record. The State ignores the repeated language from Ms. Zimmerman that it was all one motion. The State ignores the testimony that Mrs. Zimmerman was coming around a corner at the very moment the incident occurred. There is no testimony that there was any timeframe in which WEM saw Ms. Zimmerman, knew who she was and

then lowered his shoulder and pushed into her. That is simply not the testimony. Nor did the judge so find. Nowhere at trial did the judge find that WEM had initiated the shove. To the contrary the argument at trial, which was accepted by the court, was always that because WEM participated in the "bumping game" among students sometime prior to the day in question (and only among friends),[10] somehow he was a willing participant in the hands of KJJ on the day in question. For the State to now try to create new findings of facts is to do great disservice to the testimony before the court, the ruling of the judge, and to introduce facts which were never established and which cannot be established because they never occurred.

II. A Lesser Included Charge Is No Longer Available

a. A Claim of Assault Is Not a Lesser Included Charge

The State now suggests WEM could be convicted on a lesser included charge, namely assault under Utah Code Ann. §76-5-102. However, that charge is not a lesser included charge because the end result could be a finding of a Class A misdemeanor, which is the very conviction WEM is appealing. Moreover, Utah Code Ann. §76-5-

[10] The State wants to suggest Ms. Bench gave clear warnings to WEM about "shoulder checking" prior to the day in question. On this point, Ms. Bench was exceptionally evasive at trial, even as noted by the judge. In fact the record is devoid of any clear warning from Ms. Bench. Although the school kept a significant record of all of WEM's infractions, there was nothing written in his record indicating any warning by Ms. Bench. She herself could not give any detail about any warnings she may or may not have given, using terms such as "more than likely" and "I would think." (R.24 [Transcript] at 99-100.)

102.3, under which WEM was tried and convicted, does not identify Utah Code Ann. §76-5-102 as a lesser included offense.

b. Utah Code Ann. §76-1-402 Does Not Permit Seeking a Lesser Included Charge at This Stage of the Proceedings.

The language of Utah Code Ann. §76-1-402 says that because WEM has been convicted of assault of a school employee, that conviction bars prosecution under any other provisions of the law relating to a single criminal episode. Likewise, if his conviction is overturned on appeal, WEM could be tried on a lesser included offense but only "if such relief is sought by the defendant." *Id.* *See also State v. Johnson*, 821 P.2d 1150, 1159-60 (Utah 1991). Defendant WEM did not seek such relief and at this point in time it cannot be imposed on him.

c. The State Gave No Notice of Seeking a Lesser Included Charge

At no time before the appeal was WEM ever advised that he could be charged with assault under Utah Code Ann. §76-5-102. To the contrary when there was a discussion of a plea in abeyance prior to trial, the State specifically rejected accepting a plea of a Class B misdemeanor, insisting that as part of the plea WEM be fingerprinted, give a DNA sample, and have a mug shot taken. That only applied if, as a juvenile, he was convicted under a Class A misdemeanor. For the State to now try to claim a charge which could possibly result in a Class B misdemeanor is a total reversal of the position the State took up to and through trial. As stated in *State v. L.G.W.*, 641 P.2d 127 (Utah 1982), a case cited by the State in its Brief, notice is the heart of permitting a lesser

included charge to go forward. *Id.* at 130. Thus no claim of the right to include a lesser charge was ever preserved.

d. The Elements of Assault As a Lesser Charge Were Never Proven.

The Utah Supreme Court has made clear that seeking a conviction on a lesser included offense "is only appropriate where the lesser offense 'is established by proof of the same or less than all the facts required to establish the commission of the offense charged.'" *State v. Crick*, 675 P.2d 527, 533 (Utah 1983). The State has not proven a case of assault under Utah Code Ann. §76-5-102. There is no evidence WEM attempted to do bodily injury to Ms. Zimmerman, as more than amply discussed above. He neither made a threat nor committed an act of violence. He was not aware he would be pushed into Ms. Zimmerman and there was no substantial risk which he consciously disregarded, that such would occur on the morning in question. He was pushed only once before the incident in question and then only a few seconds before. There was thus no "gross deviation from the standard of care" by WEM. He was the victim, not the actor. There is no evidence of substantial bodily injury to Ms. Zimmerman. At most she received a momentary sting to her body which caused her no problems after a few seconds. Finally, there was no proof that Ms. Zimmerman was pregnant.

In making its argument concerning its claim of assault, the State again badly misstates the facts. WEM never testified he acted recklessly, either on that day or on any other day. He stated he was playing with his friends on previous days and did no pushing or

shoving on the day in question. The record is devoid of any evidence that after Ms. Bench allegedly warned WEM, he did any pushing or shoulder checking at all. He certainly did none on the day in question. Thus the State totally mischaracterizes the fact that when WEM was pushed by KJJ and stumbled into Ms. Zimmerman, that such was a voluntary lowering of his shoulder, thus showing he was an active participant. The contrary is true, namely that no voluntary act by WEM was involved. The claim by the State completely misstates facts, as has been fully discussed earlier herein.

In short, there is no evidence supporting a charge of assault, and such a claim should be summarily denied, assuming this court were willing to consider assault as a lesser included offence.

III. This Court Should Use Its Equitable Powers to Overturn the Juvenile Court Ruling

The State does admit that an appeal court in reviewing juvenile matters has a great deal of discretion (citing *In re L.G.W.*, 641 P.2d 127 (Utah 1982)). Indeed, a defendant in a juvenile court does not have a right to a jury trial, and thus the protections of the law in that respect are denied to juveniles. Thus the Supreme Court in *In re L.G.W.* confirmed that in appeals of juvenile court decisions, it had "its broadest scope of appellate review." *Id.* at 130. This is a case where such broad discretion should be exercised to overturn an unjust decision.

In its Brief the State suggests that the juvenile court is a place of compassion and acts more like a concerned parent. Appellee Brief at p. 30. If it is such a rewarding

experience, one has to wonder why it took two prosecutors to prosecute this case at trial. The State also talked about the sentence imposed as requiring "only" twenty hours of compensatory service, a five day term of detention, and a letter of apology. The State in its Brief fails to note the following additional sanction:

> MS. DAUGHERTY: And Your Honor, given that this is a Class A DNA is mandatory.
> THE COURT: He's 15. I thought he was a bit younger. I don't have discretion. You have to provide DNA, fingerprint and photographs. There's a $150 collection fee, you'll have to pay that. I don't have discretion to waive it. But I'm not imposing any fines. You have 60 days to take care of that.
> (R. 24 [Transcript] at 117.)

The State also criticizes WEM's Brief for raising what might be considered philosophical discussions about the school system and the role of the school in referring matters to the juvenile court on a knee jerk basis. WEM does not challenge the right of the school to abdicate its own role in handling minor student issues on administrative basis and choosing rather to throw the whole matter to the juvenile court. In that regard the school was doing exactly what Justice Lucero of the Tenth Circuit Court of Appeals said is happening too often currently, meaning that Eisenhower Jr. High is treating its students like criminals. The State played right into the school's hands, assigning two prosecutors, each taking turns questing witnesses, to try the matter before the juvenile court. That does not sound like compassion. Moreover, once the judge had reached his decision in which he concluded that horseplay was at issue and that he was going to try to give as light a sentence as possible, the State then insisted that WEM be fingerprinted,

give a DNA sample and have a mug shot taken, just like a common criminal. That does not sound like handling a case with finesse and with concern for the development of a child.[11]

Thus this court should take into consideration exactly how little evidence was ever presented to prove the case against WEM. The court should also note that Ms. Bench, who referred the matter to the juvenile court and whose testimony at trial is relied upon by the State, lied on the stand. Even though she reviewed the surveillance tape and saw the report of KJJ, and worked with Officer Dial, all of which confirmed that WEM was pushed by KJJ, she denied knowing of any push. (R. 24 [Transcript] at 103.) If there is one person who testified at trial in this case we cannot believe, it is Ms. Bench. She was even characterized by the judge as "being a bit difficult." (R, 24 [Transcript] at 98.) For some unexplained reason, Ms. Bench had some kind of vendetta against WEM. She was going to make certain that WEM had to go to juvenile court, even if one of the charges she initially filed was dropped by the prosecutor.

The State makes light of the sentence imposed in this particular case, suggesting that it was a mere slap on the hand. One would have to think that if a member of the Attorney General's Office was pushed into a school employee and charged with and

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[11] In a study from 2014 entitled *From Fingerpaint to Fingerprints, The School-to-Prison Pipeline in Utah*, published by the S.J. Quinney College of Law, under the supervision of Associate Professor Emily Chiang, the data reflects that Granite School District was the worst performing school district in the State of Utah for disciplinary actions against Pacific Islander students and one of the worst for disciplinary action against Hispanic students. *See* page 14 of study.

found guilty of an assault of a school employee, that individual would consider the matter a serious one, even if they were "only" required to do community service, give a DNA sample, have their fingerprints taken, and pose for a mug shot. That sting is made manifold in the life of a young impressionable student.

V. CONCLUSION

For all the reasons stated, the guilty verdict of WEM should be reversed in its entirety.

CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

Joseph C. Rust, as attorney for appellant WEM, hereby certifies that this brief complies with the type-volume limitation, meaning that the number of words in the brief are less than 7,000 words.

DATED this 4th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by U.S. Mail two true and correct copies of **REPLY BRIEF OF APPELLANT W.E.M.**, this 4th day of March, 2016 to:

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